

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) **CRIMINAL NO. 10-2734 JH**
)
JOHN CHARLES McCLUSKEY,)
TRACY ALLEN PROVINCE, and)
CASSLYN MAE WELCH,)
)
Defendants.)

ORDER REGARDING MENTAL HEALTH EVIDENCE

Based upon Fed. R. Crim. P. 12.2 and the inherent authority of this Court, the Court hereby orders the following:

A. If Defendant intends to introduce expert evidence during the penalty phase of his trial, relating to mental disease or defect, or any other mental condition of Defendant bearing on the issue of punishment, Defendant must file written notice thereof no later than June 8, 2012.

Defendant's notice shall include the name and professional qualifications of any mental health professional who will testify as an expert and a brief, general summary of the topics to be addressed that is sufficient to permit the Government to determine the area in which its expert must be versed. The notice shall include experts who are basing their opinions on a review of records and not a personal examination of Defendant.

B. If Defendant files notice of plans to introduce expert mental health evidence at the penalty phase, Defendant shall be examined by a psychiatrist or other mental health professional

selected by the Government. The Government's examination shall take place no later than August 8, 2012, presuming Defendant is made available to the Government during that time. The report of that examination and the expert report of any examination initiated by Defendant shall be filed under seal with the Court before the commencement of the guilt phase of Defendant's trial.

C. In anticipation of such notice from Defendant, the Government shall designate an Assistant United States Attorney ("AUSA") from the District of New Mexico as a fire-walled AUSA to arrange for any evaluation by an expert designated by the Government, handle any issues arising out of the evaluation process, and arrange for filing of expert reports under seal. The fire-walled AUSA may not join the prosecution team until Defendant gives notice confirming his intent to introduce expert mental health evidence during the penalty phase of the trial. Any individuals assisting the fire-walled AUSA shall be subject to the same requirements and restrictions as the fire-walled AUSA.

D. If there is a guilty verdict on a death-eligible count in the trial of this case, Defendant shall, no later than 24-hours after issuance of such a verdict, file a pleading confirming or disavowing his intent to introduce mental health evidence at the penalty phase. If Defendant withdraws his previously tendered notice, the results of any mental health examinations concerning Defendant will not be released to the Government's trial team and the fire-walled AUSA may not join the Government trial team.

If Defendant confirms his intent to introduce mental health evidence at the penalty phase, the reports of any examinations by a Government expert shall be released to Defendant immediately after Defendant files his pleading confirming the earlier notice. No later than 24 hours after release of the Government's reports, the report or reports of any defense

experts shall be released to counsel for the Government, or defendant shall file a notice of withdrawal of his intent to introduce expert mental health evidence.

E. Even if Defendant confirms his intent to offer mental health evidence, Defendant may withdraw a notice of intent to introduce such evidence at any time before such evidence is presented at trial. In that event, none of the fact of notice, results, or reports of any mental examination, or any facts disclosed only therein shall be admissible against Defendant.

F. Failure of Defendant to provide notice, or to participate in a Court-ordered examination, or to confirm his intent to introduce mental health evidence at the penalty phase, may result in forfeiture of the right to present mental health testimony at trial.

IT IS SO ORDERED.



JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE